No. 87-1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, *Chairman;* SUNAO KIDO, *Commissioner; and* RUSSEL S. NAGATA, *Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,*

Petitioners,

v.

HAWAIIAN TELEPHONE COMPANY, *a Hawaii Corporation,*

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

This brief is filed under S. Ct. Rule 22.6 in response to the Brief for the United States ("U.S. Br.") filed June 6, 1988.

ARGUMENT

Although the Government concedes that this Court has once granted review but has yet to resolve the important, recurring, and unsettled issue whether 47 U.S.C. § 401(b) permits private enforcement actions of non-adjudicatory

FCC orders against state rate commissions (U.S. Br. at 10),[1] that the Hawaii PUC would not have been preempted from addressing HawTel's statements by ordering rate of return reductions much higher than the 1.1 percent here (*id.* 17 n.4), and that the injunction here is both "troublesome[ly]" specific (*id.* 18) and wholly unneeded because the PUC might have granted rates sought in an "increase [docket] based on test year 1985" (*id.* 19 n.17), the Government counsels denial of review because the First Circuit, despite its rulings, "might" find § 401(b) apt (id. 12), whether the rate orders here are preempted turns on a "factual dispute" (*id.* 16), the legal—indeed jurisdictional—effect of state court rulings (which conflict with the decision below) by which HawTel lost, and then forfeited, the claims on which federal judicial relief issued, is a "fact-bound question" (*id.* 18), abstention is inapt because "there are no ongoing state proceedings" (*id.* n.18), and petitioners' ripeness and remedial issues are only about "the form of the order" (*id.* 17).

Not only are all the Government's reasons for denying review totally wrong, the Government proves why the decision below, allowed to stand, will leave gaping holes in the statutes and doctrines that bar incursions by the federal district courts into state ratemaking.

A. The Government Offers No Good Reasons Why This Court Should Not Decide the Reach of 47 U.S.C. § 401(b).

The Government concedes that the decision below to assume jurisdiction under 47 U.S.C. § 401(b) conflicts "with the First Circuit's approach" (U.S. Br. 11 (citing *New England Tel. & Tel. Co. v. PUC*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986)). While this itself counsels review,[2] the Government's reason why the § 401(b)

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[1] (citing *Public Serv. Comm'n of Maryland v. Chesapeake & Potomac Tel.*, No. 84-1362, *cert. granted*, 472 U.S. 1026 (1985), *vacated and remanded on other jurisdictional grounds*, 476 U.S. 445 (1986)).

[2] *See, e.g., Schiavone v. Fortune*, 477 U.S. 21, 22 (1986); *Webb v.*

issues should not be decided—that "it is not at all clear that the two courts would reach different results on the facts of this case" (U.S. Br. 11)—is wrong on its own terms. Focusing on a PUC commissioner's service on the Joint Board that recommended Order 81-312, the Government relies on the First Circuit's dicta that if a state PUC had been named in an adjudicatory action, and a § 401(b) action were commenced against the PUC on the resulting adjudicatory order, then § 401(b) might apply. This dicta is inapt. The Government does not and could not argue the Joint Board in recommending, or the FCC in adopting, Order 81-312, acted in other than a rulemaking capacity. Section 410(c), 47 U.S.C. § 410(c), is clear that such Joint Board proceedings are solely "pursuant to a notice of proposed rulemaking," and there is no claim that Order 81-312 was issued by trial-type process. There is a conflict here.

Efforts to diminish the conflict are also belied by claims that the court below would act differently given a "general rule" (U.S. Br. 12). Here, as is admitted, the FCC did no more than "concisely" state "that the Ozark Separations manual 'SHALL APPLY to Hawaii' " (*id.* 11). Order 81-312 did not address the issue here: whether and how far the PUC could reduce HawTel's rate of return on the basis of HawTel's own past statements. The Government could not be more wrong in arguing that the First Circuit's concerns over private enforcement where the FCC has not " 'previously considered and determined the specific rights and duties in question' . . . are not present here" (*id.*). HawTel's misleading acts were not apparent until months after FCC Order 81-312 was issued on June 29, 1981 (A249), namely, when on August 23, 1981, HawTel filed its shocking request for $47.6 million in new intrastate revenues (A123).

Moreover, efforts to distinguish *New England Telephone* produce uncertainty (which an APA-based approach avoids)

Dyer County, 471 U.S. 234, 239 (1985); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 669 n.6 (1977).

to be eschewed in jurisdictional analysis. The view that jurisdiction under § 401(b) can be asserted if "it does not seem unfair" (U.S. Br. 11), reflects a view of "equitable" subject matter jurisdiction that obtains nowhere else. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978).[3]

This Court has already decided that an apparent conflict with *New England Telephone* merits review. The issues it heard in No. 84-1362 (U.S. Br. 10), but did not decide, are as follows:

> (1) Does § 401(b) of Communications Act embrace orders issued by Federal Communications Commission in course of rulemaking proceedings, as FCC has urged and court below has held, or is section limited to FCC orders issued in adjudicatory proceedings, as U.S. Court of Appeals for the First Circuit has held? (2) Is state utility regulatory commission "person" within meaning of § 401(b) . . .?

No. 84-1362, 56 U.S.L.W. 3693 (U.S. Feb. 2, 1985). Question 1 of our petition squarely presents these identical issues. In recognition of its past order, the Court should grant review.

B. The Notion that Preemption May Be Based Upon the Remedy a State Imposes Within its Sphere of Regulation Defies Not only 47 U.S.C. § 152(b) but the Precepts of the Johnson Act.

The Government's concession that "an adjustment of the intrastate rate of return in light of the Hawaiian Telephone Company's receipt of transitional supplement payments would appear to be appropriate in light of its representations that the payment would limit its need to raise intrastate rates," (U.S. Br. 15-16), counsels summary reversal. Instead, the Government argues against even re-

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[3] Indeed, the Government is loathe to suffer itself to be haled into court on such a "ticket good on this day and train only." *See* Pet. Br. at 43, *United States v. Hohri*, No. 86-510.

view because "[i]t is not indisputably clear whether in fact the Hawaii PUC made '[such an adjustment]' " (*id.*). Because, the Government urges, since the *effects* of the PUC remedy coincide roughly with those of abandoning the FCC rules, it might be thought Hawaii "attempted" to " 'depart from [the federal formulas]' " (*id.*), and hence the issue here is a "factual dispute" undeserving of review (*id.*).

The Government is wrong. This is not an Establishment Clause or race discrimination case, where the animus underlying state action is properly the focus, and evidence of a mixed motive may require invalidation. *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985); *but cf. Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984); *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J.).

This is a preemption case in which, if the state is in its sphere, federal courts "literally ha[ve] no power to act." *Louisiana PSC v. FCC*, 476 U.S. 355, 374 (1986). As in *Pacific Gas & Electric Co. v. Energy Resources Comm'n*, 461 U.S. 190 (1983), the courts below should not have "become embroiled in attempting to ascertain [the PUC's] true motive." *Id.* at 216. The issue is not the State's intent, but whether there is "an actual conflict between state and federal law." 461 U.S. at 216 n.28. Nowhere does the Government argue such a "conflict," as the Court has defined it, exists. *E.g., California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1425 (1987).

The Government gains nothing from a claim that the "subregime" for separations "preempts the field" (U.S. Br. 14-15). Even on such a view, it remains whether the PUC order "regulates *within* this exclusively federal domain." *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1153 (U.S. 1988). Not unless "[e]ach" purpose of the order "is an attempt to regulate matters within [the FCC's supposedly] exclusive jurisdiction," *id.* at 1155, is this so. When, as here, the PUC has "authoritatively construed," *id.* at 1154, its purpose as holding HawTel to its own demands, and not as departing from FCC formulas, and

that construction is not irrational, a court may not hold otherwise even if the PUC's motive is "not indisputably clear" (U.S. Br. 15). It is Congress's intent that counts, and, given the Government's own view that HawTel would have no preemption claim if the PUC denied, say, three times the revenues here (*id.* 17 n.16), it would be odd if the " ' " 'clear and manifest purpose of Congress,' " ' " *Puerto Rico Department of Consumer Affairs v. ISLA Petroleum Corp.*, 108 S. Ct. 1350, 1353 (1988), was to prevent the PUC from imposing the lesser remedy it chose.

Thus, the fight here is not "a factual dispute" of "historical interest" (U.S. Br. 15-16) but involves millions in intrastate charges wrongly exacted from ratepayers,[4] and the most basic issues of federalism.[5] Permitted to stand, the panel's preemption analysis, which permits state orders to be nullified on a "factual" inference of "anti-federal" intent, will have radical effects supported nowhere in present law.[6] In short, nothing the Government argues answers the claim that the panel evaded the Johnson Act, and accepted "essentially the same kind of argument that th[is] Court rejected in *Louisiana*" (A33). The PUC was engaged in intrastate ratemaking, and the inferior federal courts here "literally ha[d] no power to act."

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[4] That petitioners would, upon the relief prayed here, seek return of the charges wrongly ordered by the Ninth Circuit is consistent with our ripeness argument. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 183, 200 (1985) (reversing $350,000 jury verdict and remanding).

[5] The Government at most wrongly uses " 'the vexing nature' " of the distinction of law from fact to "diminish its importance, or the importance of the principles that require [it] to be drawn." *Bose v. Consumers Union*, 466 U.S. 485, 501 (1984).

[6] As stated (Pet. 21-22; Reply 2-4), given the tensions in "dual federal and state regulation," the panel allows any rate of return adjustment to be recast as a breach of FCC separation rules that may be nullified in the federal courts. Nothing, of course, confines the panel analysis to the Communications Act.

C. The Grounds for Review Based Upon Precepts of Comity, Abstention and Justiciability Remain Compelling.

1. The Government like the lower court ignores that effects of state judicial orders in Dockets 4306 and 4588 are state law matters. 28 U.S.C. 1738. Our full faith and credit claims do not present "fact-bound" issues (U.S. Br. 18). This Court need not decide how Hawaii courts would apply the changed facts rule to the order in Docket 4306 (test year 1982), or whether Hawaii Rule of Appellate Procedure 42 (*cf.* U.S. Br. 18 n.18) bars HawTel's attempt to litigate claims it forfeited in appeal No. 10169 (test year 1983), which our state court dismissed. As is done routinely, all this Court need do here is vacate and remand for application of Hawaii law, preferably with instructions to certify questions to the Hawaii Supreme Court (Pet. 24; Reply 5-6). Given the issues that might be avoided, this course, if not certification by this Court, is warranted.

2. The state court's orders are of even greater import given the jurisdictional rule of *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 484 n.18 (1983).[7] Whatever HawTel's motive was for forfeiting review of *HawTel I*, (U.S. Br. 18), as the dissenting judge below noted, the federal claim in that case is identical to that here. A36; *see id.* A184, A187 (claim that recouping transition payment breaches FCC rules). *Feldman* doubly applies since HawTel forfeited review of Docket 4588—the order at issue—by abandoning appeal No. 10169. To deny review would turn the Johnson Act on its head, allowing collateral relief more powerful than the most deserving prisoner obtains. *Lehman v. Lycoming County*, 458 U.S. 502, 512 (1982); *Tollett v. Henderson*, 411 U.S. 258, 266 (1973); *see Deakins v. Monoghan*, 108 S. Ct. 523, 530 (1988).

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[7] The claim that dismissal in No. 10169 after our answers were filed, A211, 213 n.1, was not "press[ed]" (U.S. Br. 18 n.18) is wrong, *see* A199-202; Br. of Appellant, No. 85-1907 (9th Cir. 1985) at 1 (Issue "E"); *id.* at 55, 58 (facts in No. 10169; "Hawaii and federal laws prohibit . . . relitigation of issues that . . . should have been incorporated into the action in another forum"), and, given *Feldman*, irrelevant.

3. Even if transporting HawTel's claim to the "new setting" of 1985 rendered preclusion inapt, it is conceded we "would have reconsidered" if HawTel filed a 1985 test year docket (U.S. Br. 18). Thus, the issue *here* is unripe under *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, and the judgment is error under abstention rules. *See Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987). Ripeness is not waivable. *Bender v. Williamsport District*, 475 U.S. 534, 541 (1986). Abstention was also not waivable, or waived. *See* Pet. 25-26; Pet. Reply 7 & n.5.

a. The Government simply ignores ripeness. Our claims here on are *not* about the "form of the order" (U.S. Br. 17), but about whether the lower courts had Article III power to enter *any* order.[8] If HawTel felt it would be harmed in 1985 by maintenance of the rate adjustment, its duty was to assemble the data showing the impact on HawTel's total revenue picture in its 1985 test year submission or seek interim relief, *see* Haw. Rev. Stat. § 269-16(c), A227-28. HawTel's remedy was not to abort state processes when it could not obtain the PUC's advance ruling in a docket whose evidence was not targeted to the "changed circumstances" HawTel complained of. Failure to grant certiorari, given these facts, would create an anomalous second-class Article III jurisprudence for States seeking the same protection the Government has long enjoyed, and this Court has recognized, against piecemeal

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[8] We do attack the "troublesome" injunction here, which bars our action on "the transitional supplement payment" (U.S. Br. 16, 17 n.14). This remedial claim was passed on by the court below in its ruling that the rate reduction "produced *results* inconsistent with the objective of a federal statute," A28 (emphasis added). This allows review. *Adickes v. Kress*, 398 U.S. 144, 147 n.2 (1970). Given Article III and Eleventh Amendment concerns from overbroad orders in private actions, *Dayton Board v. Brinkman*, 433 U.S. 406, 420 (1977); *Lelsz v. Kavanaugh*, 807 F.2d 1243, 1252, *reh. denied*, 815 F.2d 1034 (5th Cir. 1987), review is doubly warranted. *See also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). The Government is also wrong in claiming (U.S. Br. 17) that we have no right to be freed of unwarranted limits on our discretion. *Lyng v. Northwest Indian Ass'n*, 108 S. Ct. 1319, 1324 (1988).

review of agency action, *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980), *cited*, 473 U.S. at 192, and reverse principles of ratemaking procedure dating to the *Minnesota Rate Cases*, 230 U.S. 352 (1913). *See id.* 466.

b. Nor is abstention inapt simply because "there are no ongoing state proceedings" (U.S. Br. 18 n.18).[9] The claim on its face is wrong insofar as neither *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), nor *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), which were formulated specifically to address federal judicial attacks that undermine comprehensive regulatory schemes, depend upon "ongoing proceedings." *Burford*, 319 U.S. at 327-34; *Pullman*, 312 U.S. at 498-502. Indeed, the "types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987). An "ongoing proceeding" requirement ought not be "rigidly" enforced, even on a claim of *Younger* abstention, *see Younger v. Harris*, 401 U.S. 37 (1971), if all other *Younger* requirements are met, tools to invoke state processes are in the hands of a federal litigant, and, as a practical matter, regulation is a continuous process.[10] Even if one wrongly assumes the judgment below did not violate *Burford*, *Pullman*, and *Younger* in their own right, clearly the Ninth Circuit ignored the "complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil*, 107 S. Ct. at 1526 n.9. This is particularly so when a state court litigant has not just "fail[ed] to assert its state remedies in a timely manner," *id.* at 1529 n.16, but has voluntarily aborted an ongoing state judicial proceeding in order to sandbag the state's regulatory system with massive—and unprecedented—federal judicial relief.

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[9] The premise for this claim is not clear, particularly at the time relief was entered in the district court, *see* PUC Order 8180 (Nov. 23, 1984) (Docket 5114) (test year 1985), Ex "A" to Reply Mem., No. 84-1306 (D. Haw. Dec. 10, 1984).

[10] This is all the more true under the Government's view of the narrow preclusive effect of state ratemaking judgments.

CONCLUSION

For the foregoing reasons and those stated previously, the Court should grant the petition for certiorari.

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